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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re TREY W. et al., Persons Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANGELA W.,

Defendant and Appellant.

F043097

(Super. Ct. No. 01CEJ3002221)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. A. Dennis Caeton, Judge.

Mario de Solenni, under appointment by the Court of Appeal, for Defendant and Appellant.

Phillip S. Cronin, County Counsel, and Howard K. Watkins, Deputy County Counsel, for Plaintiff and Respondent.

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Angela W. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her son and her daughter.¹ Appellant contends section 366.26 violates

* Before Dibiaso, Acting P.J., Buckley, J., and Wiseman, J.

her due process rights because it authorizes termination of parental rights without requiring the state to prove the lack of a parent/child bond. She also argues a conflict of interest existed because she and her daughter's father were legally represented by entities which had similar sounding names, one being "Barker Civil" and the other "Barker Downtown." On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

In January 2002, the Fresno County Superior Court adjudged appellant's four-year-old son and two-year-old daughter dependent children of the court and removed them from appellant's custody. The court previously determined the minors came within its jurisdiction under section 300, subdivisions (a) and (b), because appellant's inability to control her anger placed the children at serious risk of physical harm.

Although appellant completed certain courses towards reunification, she persisted in acting out in a violent manner. Psychologists agreed appellant was a poor candidate for successful therapeutic intervention; they estimated treatment would take years. Consequently, the court terminated reunification efforts in August 2002 and set a section 366.26 hearing to select and implement a permanent plan for the children. This court upheld the orders terminating services and setting the section 366.26 hearing in *Angela W. v. Superior Court*, F041378.

At the section 366.26 hearing, appellant urged the court not to terminate her parental rights, despite undisputed evidence of her children's adoptability. She testified she had "very much" of a bond with her son and a bond with her daughter although not as great. She added that she regularly visited with her children during their dependency and that she took care of them during those visits.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The social worker from the Fresno County Department of Children and Family Services (the department), who prepared the adoption assessment, confirmed there was a bond between appellant and her son but that it was an unhealthy one. As for appellant and her daughter, the social worker testified there was no parent/child bond. The children were placed together and it would be detrimental to separate them. A psychologist who prepared a bonding study also reached similar conclusions.

Following argument on the matter, the court found the children adoptable and terminated parental rights.

DISCUSSION

I. *Due Process*

Appellant contends section 366.26 violates her due process rights as a parent because it authorized the termination of her rights without requiring the department to prove the lack of a parent/child bond. According to appellant, the strength of a parent/child bond is an essential element in determining whether parental rights should be terminated such that the lack of a parent/child bond should be part of the department's burden of proof.

Section 366.26, however, does not require such proof. Instead, by the time of a section 366.26 hearing, if there is clear and convincing evidence of the dependent child's adoptability, the court must terminate parental rights unless one of the specified circumstances in subdivision (c)(1) provides a compelling reason for finding that termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) According to caselaw, the burden shifts to the parent to prove, in particular, the first exception, which is the benefit a child would receive from the continuing the parent/child relationship when the parent has maintained regular visitation and contact (§ 366.26, subd. (c)(1)(A)). (See, e.g. *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.)

In challenging the constitutionality of section 366.26, appellant acknowledges the California Supreme Court's decision in *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242 (*Cynthia D.*) that California's termination of parental rights procedures comport with due process. She nevertheless urges this court to re-evaluate the *Cynthia D.* holding.

We decline appellant's invitation if for no other reason than we are bound by and must follow the decisions of the California Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). While appellant appears to base her argument on her interpretation of the United States Supreme Court's opinion in *Santosky v. Kramer* (1981) 455 U.S. 745, we note that the *Cynthia D.* court reached its decision by applying *Santosky v. Kramer, supra*. (*Cynthia D., supra*, 5 Cal.4th at pp. 250-256.)

In *Santosky v. Kramer, supra*, the United States Supreme Court found that New York's procedures for terminating parental rights violated due process and held that due process required the state to support its allegations for termination by at least clear and convincing evidence. In reaching its decision, the *Santosky* court balanced the private interests affected, the risk of error created by the state's chosen procedure, and the countervailing governmental interest supporting the procedure. (*Santosky v. Kramer, supra*, 455 U.S. at pp. 753-754.) Notably, the United States Supreme Court did not rule, as appellant implies, that the state must prove the lack of a parent/child bond to satisfy due process.

The California Supreme Court in *Cynthia D., supra*, 5 Cal.4th at page 253, found the three *Santosky* factors did not compel a heightened standard of proof under our statutory scheme. In the process, the *Cynthia D.* court distinguished in detail California's procedure for termination from New York's. The California Supreme Court also observed that by the time termination is possible under our dependency status the danger to the child from parental unfitness is so well established that "there is no longer 'reason to believe that positive, nurturing parent-child relationships exists.'" (*Cynthia D., supra*, 5 Cal.4th at p. 256, quoting *Santosky v. Kramer, supra*, 455 U.S. at p. 766.)

We acknowledge appellant's constitutional attack on section 366.26 is not on all fours with the argument urged in *Cynthia D.*, *supra*. Nevertheless, the *Cynthia D.* court's expansive examination of the entire process for terminating parental rights under California's dependency statutes, including section 366.26, subdivision (c)(1), convinces this court that the department does not have to prove the lack of a parent/child bond as part of its case for termination in order to satisfy appellant's due process rights.

II. *Conflict of Interest*

As mentioned, appellant also claims she is entitled to a reversal of the termination order because of a conflict of interest. Observing that she and her daughter's father were legally represented by entities which had similar sounding names, one being "Barker Civil" and the other "Barker Downtown," appellant assumes there was an apparent conflict of interest. We find no merit to appellant's argument because the record is silent. Appellant has the burden to affirmatively show error on the record. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72.) Here, the record reveals nothing more than what we have stated above, namely appellant and her daughter's father were legally represented by entities which had similar sounding names, one being "Barker Civil" and the other "Barker Downtown." Had appellant had reason to believe there was a conflict, she should have raised the issue in the juvenile court and at least developed a record for this court to review.

DISPOSITION

The order terminating parental rights is affirmed.